

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT KNOXVILLE

STEPHEN OTIS NICELY,

Petitioner,

v.

No.: 3:05-cv-04  
(VARLAN/SHIRLEY)

VIRGINIA LEWIS, Warden,

Respondent.

**MEMORANDUM AND ORDER**

This is a petition for the writ of habeas corpus pursuant to 28 U.S.C. § 2254; petitioner was convicted of rape of a child and aggravated sexual battery. The matter is before the court on petitioner's motion to reconsider the denial of his motion for discovery; petitioner has also filed a motion for appointment of counsel to assist petitioner in obtaining discovery. For the following reasons, the motions are **DENIED**.

In his motion for discovery, petitioner sought records from the office of the District Attorney in Knoxville, Tennessee, specifically the following: (1) records in relation to a criminal case against Missy Hales, in which Wilma Wynn (the victim's mother and also petitioner's girlfriend, who testified for the defense in petitioner's case) was apparently the prosecuting witness; and (2) records relating to any perceived favoritism shown to Janice Nicely, petitioner's sister-in-law who was a witness for the State in petitioner's case. The court denied the motion, finding that petitioner failed to provide sufficient reasons for his

discovery request, as required by Rule 6(b) of the Rules Governing Section 2254 Cases In The United States District Courts.

Petitioner now asks the court to reconsider denying the request for records in relation to the criminal case against Missy Hales. According to petitioner, the records will prove a conflict of interest on the part of the prosecutor in petitioner's case, thus supporting his claims of prosecutorial misconduct. The court notes, however, that respondent contends the claims of prosecutorial misconduct are procedurally defaulted. Under the circumstances, the motions to reconsider and to appoint counsel [Court File Nos. 16 & 17, respectively] are **DENIED WITHOUT PREJUDICE**. Should the court determine that petitioner's claims of prosecutorial misconduct are not procedurally defaulted, the court will reconsider petitioner's request for discovery and for appointment of counsel.

**E N T E R :**

s/ Thomas A. Varlan  
UNITED STATES DISTRICT JUDGE